Supreme Court, U.S.
FILED
MAY 16 2002
OFFICE OF THE CLERK

No. 01-1292

IN THE

Supreme Court of the United States

EPILEPSY FOUNDATION OF NORTHEAST OHIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

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May 16, 2002

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CORPORATE DISCLOSURE STATEMENT

Petitioner Epilepsy Foundation of Northeast Ohio is an unincorporated association with no parents or subsidiaries that have issued shares to the public.

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REPLY TO BRIEF IN OPPOSITION

Petitioner, Epilepsy Foundation of Northeast Ohio (the "Foundation"), respectfully submits this reply to the brief filed on behalf of the respondent National Labor Relations Board ("Board") in opposition to the Foundation's petition for a writ of certiorari.

I. DENIAL OF THE PETITION WILL UNNECESSARILY PROLONG THE CONFLICT AMONG THE APPELLATE COURTS

The Board attempts to circumvent the conflict between the decision below and the decision of the Ninth Circuit in *E. I. du Pont de Nemours and Co. v. NLRB*, 707 F.2d 1076 (9th Cir. 1983), by observing that the Ninth Circuit "did not hold that, as a categorical matter, non-union employees have

no right to the presence of a coworker at an investigatory interview." Opp. at 13. The Ninth Circuit allowed that it was conceivable that a co-worker's representation of a nonunion employee at a disciplinary interview could constitute concerted activity for mutual aid or protection if there were "a showing that the requesting employee acts as part of a group." 707 F.2d at 1079. The Board then suggests that because the record in the instant case allegedly is "replete" with evidence that Borgs engaged in concerted activity prior to his disciplinary interview, the D.C. Circuit's holding is indistinguishable from the Ninth Circuit's holding. Opp. at 14.

Studiously unacknowledged by the Board is the categorical nature of the rule adopted by the Board and affirmed by the D.C. Circuit in the present case. Nowhere in the Board's opinion below is there any indication that the Board considered the other activity of Borgs in concluding that Borgs was entitled to a representative. Quite to the contrary, the Board promulgated a blanket rule extending *Weingarten* rights to all nonunion workplaces regardless of the presence of prior group activity. App. 23a-24a.

Thus, the Ninth Circuit held that there is no absolute right to a co-worker representative in nonunion workplaces, whereas the D.C. Circuit held there is such an absolute right. That the Ninth Circuit speculated there could be occasions when prior group activity might bring co-worker representation at a disciplinary interview within the ambit of Section 7 does not eliminate this palpable conflict. "Occasionally" is not equivalent to "always."

Not unexpectedly, the Board cannot sustain the pretense of "no conflict" throughout its brief. The Board trips over its own feet. Arguing against the Foundation's contention that the Board has created an irrebuttable presumption that all employees have collective interests, the Board asserts that no

such presumption is required to conclude that co-worker representation at a disciplinary interview constitutes Section 7 activity. According to the Board, an unrepresented employee necessarily seeks to initiate group action "when he requests a coworker to accompany him to an investigatory interview conducted by the employer." Opp. at 11-12. This is precisely the proposition rejected by the Ninth Circuit. *E. I. du Pont de Nemours*, 707 F.2d at 1079 (the possibility that an employee's request for a representative might be incipient group activity is "wholly speculative").

There is already a well-defined conflict among the appellate courts on the statutory question at issue. The Ninth Circuit's denial of *Weingarten* rights to nonunion employees stands in sharp contrast to the Third Circuit's and the D.C. Circuit's approval of a *per se* rule guaranteeing all nonunion employees the right to a representative regardless of prior concerted activity. *See Slaughter v. NLRB*, 876 F.2d 11 (3d Cir. 1989) (discussing history of litigation on this issue in the Third Circuit). There is no need to wait to hear from additional appellate courts, especially given that this question has already troubled the Board and the courts for twenty years.

II. DENIAL OF THE PETITION WILL LEAVE UNRESOLVED IMPORTANT STATUTORY AND CONSTITUTIONAL QUESTIONS

The Board minimizes the significance of its own indecision on the underlying statutory question by denying that its constant course changes have caused confusion among employers and employees. The Board unashamedly asserts that there is no confusion about the proper interpretation of Section 7 because "the relevant law was clear under the respective regimes of *Materials Research Corp.*, *Sears* and *Du Pont*" and now, of course, *Epilepsy Foundation*. Opp. at 10 n.6. The Foundation agrees with the Board that there have

been four different and irreconcilable interpretations[1] of Section 7 within a twenty year period, but draws a different conclusion from this history. The Foundation submits that this vacillation by the Board with respect to its interpretation of a core provision of the NLRA emphasizes, rather than diminishes, the importance of the issues presented for resolution by this Court. Two decades of confusion are enough.

With respect to the constitutional question, the Board argues that review is not warranted because its rule does not impose a content-based restriction on employer speech, but rather restricts employer speech based on "the *effect* of that speech upon the employee (*i.e.,* whether it is objectively reasonable for an employee to believe that the interview may result in disciplinary action)." Opp. at 16. The Board's argument reveals a gross misunderstanding of this Court's First Amendment jurisprudence.[2]

To begin, for an employee to have an "objectively reasonable" belief that he might be disciplined, the content of the employer's speech must refer to discipline. Discussions confined to sick leave, promotions or wage increases cannot trigger an "objectively reasonable" concern over discipline. Moreover, this Court has held that restrictions "that focus on the direct impact of speech on its audience" are unquestionably content-based restrictions. *Boos v. Barry,* 485 U.S. 312, 321 (1988); s*ee also Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 574 (2001) (Thomas, J., concurring) (regulations concerned with primary effect of speech are content-based regulations). The Board's rule by its own terms distinguishes between discipline-related speech and all other employer speech. This is a content-based rule. *See Turner*

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[1] Five, counting the rule in effect prior to *Materials Research Corp.*

[2] Indirectly, of course, this supports the Foundation's position that the courts have more expertise on constitutional issues than does the Board.

Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) (laws that by their terms distinguish favored speech from unfavored speech on the basis of the ideas or views expressed are content-based). The Board should not be allowed to evade review of this significant and constitutionally infirm expansion of its authority over employer speech.

III. THE FOUNDATION IS AGGRIEVED BY THE JUDGMENT OF THE COURT OF APPEALS

Following the adage that if one cannot argue substance, argue procedure, the Board contends that review of the questions presented by the Foundation is not warranted because the Foundation prevailed before the court of appeals. There is no merit to this contention.

The plain language of the court's opinion demonstrates that the Foundation lost on the principal issue decided by the court, namely whether nonunion employees are entitled to *Weingarten* rights. App. 6a-12a. Moreover, the conclusion of the court's opinion explicitly states that the court will "deny in part and grant in part the [Foundation's] petition for review." The court also states that it will "grant the cross-application for enforcement for the Board's decision to extend *Weingarten* under § 7 of the Act to nonunion employees." App. 18a. Given the court's judgment, which expressly denies the Foundation some of the relief it sought, the Board cannot credibly maintain that "the court of appeals has afforded petitioner full relief from the Board's order at issue." Opp. at 7-8. Merely because the court tempered its ruling by declining to order the Foundation to reinstate Borgs or provide him with back pay does not magically transform a partial loss into an unappealable total victory. This Court has unambiguously and unanimously held that a party is "aggrieved" and can appeal a decision when it has been denied part of the remedy requested. *Forney v. Apfel*, 524 U.S. 266, 271 (1998).

Curiously, the Board references the court's attorneys' fee award to support its claim that the Foundation is not aggrieved. Opp. at 8. The court's order on the Foundation's application for fees and costs flatly contradicts the Board's contention that the Foundation is not aggrieved.[3] Precisely because the Foundation lost on the *Weingarten* issue, the court reduced by one-half the fees awarded the Foundation. In language that leaves no room for doubt as to whether the Foundation is aggrieved, the court stated:

> The Board's modification of the *Weingarten* doctrine, however, was by far the most important issue in the case and the Board prevailed on that issue. The Foundation offers no basis upon which to allocate fees between the two lesser issues—retroactivity and substantial evidence—and the main issue in the case. In light of this failure, we allocate 50% of the submitted fees to the challenge brought against the Board's expansion of the *Weingarten* doctrine and reduce the total fee award accordingly.

Epilepsy Found. Of Northeast Ohio v. NLRB, No. 00-1332, slip op. at 3 (D.C. Cir. Mar. 29, 2002).

The fact that the court of appeals denied the Foundation the fees it requested because "the Board prevailed" on what "was by far the most important issue in the case," demonstrates that the Foundation is an aggrieved party even under the precedent cited by the Board. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332-33, 336-40 (1980) (plaintiff's individual interest in class certification question, resolution of which could affect sharing of costs of litigation among class members, sufficient to permit plaintiff an appeal from court's ruling that otherwise granted plaintiff complete relief); *see also Berthold Types Ltd. v. Adobe Sys., Inc.*, 242 F.3d 772,

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[3] The court's order on the Foundation's Motion for Attorneys' Fees and Costs Pursuant to 28 U.S.C. § 2412 has been lodged with the Clerk of this Court.

776 (7th Cir. 2001) ("Adobe is out of pocket the amount it has paid its attorneys; this concrete loss means that it is aggrieved by the outcome and entitled to appeal").

The Foundation has suffered "an adverse decision on a litigated issue" and continues to maintain a tangible "interest in the outcome of that issue." *Deposit Guar. Nat'l Bank*, 445 U.S. at 335-36 n.7. Nothing more is required to show that it is aggrieved by the judgment of the court of appeals.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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